

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

**v.
DEMETRIUS C. NELSON**

RESPONDENT,

APPELLANT.

DOCKET NUMBER WD71762

DATE: March 22, 2011

Appeal From:

Jackson County Circuit Court
The Honorable Jay A. Daugherty, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

Attorneys:

Shaun J. Mackelprang and Richard A. Starnes, Jefferson City, MO, for respondent.

Laura G. Martin, Kansas City, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI,

RESPONDENT,

v.

DEMETRIUS C. NELSON,

APPELLANT.

No. WD71762

Jackson County

Before Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

Demetrius Nelson appeals from the trial court's judgment convicting him of attempted forcible sodomy, assault in the first degree, burglary in the first degree, and attempted robbery in the second degree after a bench trial. Nelson contends that the trial court erred: (1) in denying Nelson's motion to suppress the victim's out-of-court and in-court identifications of Nelson; and (2) in denying Nelson's motions for judgment of acquittal as to the count of attempted forcible sodomy.

Affirmed.

(1) Where pretrial identifications have been made, this court will first look to see whether the procedures employed during those identifications were impermissibly suggestive. If they were, then we will consider whether those suggestive pretrial procedures affected the reliability of the identifications that were made at trial.

(2) A pre-trial identification procedure is unduly suggestive if the identification results not from the witness's recollection of first-hand observations, but rather from the procedures or actions employed by the police. Nelson failed to establish that the victim's "show up" identification was a result of impermissibly suggestive conduct by the police.

(3) Even had the procedure employed during this identification been impermissibly suggestive, Nelson failed to establish that the suggestive procedures tainted the victim's identification, as the victim had an adequate basis for her identification independent of the suggestive procedures.

(4) Nelson is not claiming that there was insufficient evidence to convict him of attempted forcible sodomy. Instead, Nelson is claiming that there was insufficient evidence to convict him of the crime as charged in the Information--that he touched the victim's vagina. Contact with the vagina is not a required element of attempted forcible sodomy. The language in the Information with respect to how Nelson committed the crime of attempted forcible sodomy was surplusage, which the State is not required to prove.

(5) Although Nelson framed his argument as a sufficiency of evidence argument, it is at most an unpreserved issue of variance in that the charging document allegedly varied from the evidence presented at trial. Nelson was not prejudiced as he was able to adequately defend against the charge of attempted forcible sodomy, despite the claimed inconsistency between the Information and the evidence presented at trial.

Opinion by Cynthia L. Martin, Judge

March 22, 2011

This summary is UNOFFICIAL and should not be quoted or cited.
